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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1206

EDWARD P. STRANG, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. A petition for rehearing *en banc* was denied on February 5, 1969. On February 26, 1969, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and includ-

ing March 27, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to counsel in connection with his appearance before the grand jury.

2. Whether the trial judge properly refused to charge the jury that it could find that the evidence established the existence of two conspiracies.

3. Whether the trial judge erred in refusing to explain and interpret in his charge all the various regulations of the Veterans Administration concerning the home loan guaranty program.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and others [1] were convicted of violating 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 1001 and to defraud the Veterans Administration by preventing it from having its loan guaranty program administered in accordance with the provisions of 38 U.S.C. 1801 *et seq.*, and of related substantive offenses. The substantive counts variously charged petitioner and his codefendants with specific violations of 18 U.S.C. 1001 by submitting false and fraudulent statements

[1] Codefendants Howard, Levinson and Franklin Mortgage Company have also filed certiorari petitions which are now pending (Nos. 995 and 1089, this Term).

to the Veterans Administration. Petitioner was convicted on each count in which he was charged. (See 8a-17a, 18a-47a, 1843a).[2] He was fined $10,000 and sentenced to imprisonment for eighteen months under the parole eligibility provisions of 18 U.S.C. 4208(a) (214a). The court of appeals affirmed (Pet. App. A).

1. The evidence is set forth in detail in the opinion of the court of appeals (See Pet. App. A 14-21, 24-25). Here we outline the scheme proved at trial, with particular emphasis on petitioner's participation since he claims that the evidence supports the conclusion that there were two conspiracies.[3]

The Veterans Administration's home loan program is based upon 38 U.S.C. 1801 *et seq.* which provides for the issuance by the VA of guaranties on mortgage loans made to veterans. Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Automatic guaranties are made on loans by "supervised lenders"—*i.e.*, any financial institution, insurance or mortgage and loan company that is subject to "examination or supervision" by an agency of the federal or a state government. Where automatic guaranties are involved, the supervised lender is responsible for determining whether the loan meets the requirements of the statute and regulations. "Non-supervised lenders"—*i.e.*, those not subject to

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[2] Record references are to the Joint Appendix filed in the court of appeals which is on file with the Clerk of this Court.

[3] We have also summarized the evidence in our response to the petitions of Howard, Levinson and Franklin Mortgage Corporation (See the government's brief in opposition in Nos. 995 and 1089, this Term, pp. 3-8).

the supervision of a federal or state agency—must seek guaranties on the "prior approval basis." In the latter situation, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. If the loan is held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA which issues its guaranty (337a).

Franklin Mortgage Corporation was a non-supervised lender and Benjamin Levinson was its president and major stockholder (341a); Ross Howard was Levinson's executive assistant (578a). In December, 1962, Howard contacted petitioner Strang, president of Wayne National Life Insurance Company, a supervised lender, and explained to him that Wayne could process VA mortgages on an automatic guaranty basis (1292a). Subsequently co-defendant Levinson and Strang entered into a written contract dated December 20, 1962, under which Franklin Mortgage Corporation would originate and process approximately $200,000 worth of loans to be made by Wayne. Wayne would then submit the loans to the VA for automatic guaranties and, after receiving the guaranties, would assign the loans to Franklin (G. Ex. 45, 1947a-1949a). Robert Cerwin, a vice president of Franklin, and an unindicted co-conspirator, testified that it was also agreed between Wayne and Franklin that Wayne would obtain the VA guaranties, but Franklin would attend to all the details, including the credit checks on the loans (581a-583a, see also 942a,

945a).[4] Although Strang sought approval for his agreement with Levinson from other officers of Wayne, he did so only after he had entered into the agreement, and without telling them he had done so (Pet. App. A 17).

Levinson thereafter contacted Rem Realty, a small real estate corporation dealing mostly with inner city properties and poor credit risks (1059a-1062a). He told its owners that he had a new source (Wayne) which could secure VA guaranties on an automatic basis (870a-873a), and would accept anything regardless of the credit risks involved. Rem Realty thereafter brought to Franklin's office approximately 12 to 15 applications which were characterized by its sales manager as "garbage"—*i.e.*, poor credit risks (869a-875a, 589a-591a). Robert Cerwin examined some of these files, and noted that some of the loans had been previously rejected. He warned Levinson that Franklin was looking for trouble if these loan applications were submitted to the VA for automatic approval. Levinson, however, ordered that the applications be processed (595a-597a).

The papers in connection with the submission of 22 loans (including these 15 from Rem) were prepared at Franklin. These papers contained false information concerning the credit of the veterans. In a number of instances the signature of the veteran borrower was forged (826a-827a, 1059a-1061a). The applica-

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[4] Strang's pre-trial statement to the FBI agreed that such was the understanding (see 1188a-1204a, 1233a-1246a). Defendant Levinson testified, however, that as he understood the agreement, Wayne alone was to check credit (1486a).

tions were not submitted to Wayne for an independent credit check. A secretary at Franklin signed Strang's name to various forms (826a-828a) but some were signed by Strang himself (825a-826a; G. Exs. 6B and D, 1914a, 1915a, 1917a). After the loans were already closed, Strang went "through the motions of approving these cases" for Wayne (600a). Even before such approval, however, there had been a partial disbursement of Wayne funds—a "very unusual" practice in the mortgage industry (985a-986a). An executive officer of Wayne, Kenneth Koppin, had cosigned the checks for partial disbursement, because Strang had assured him that they related to "good mortgages" which would make a "good investment". (933a). From his conversation with Strang, Koppin had assumed that the partial disbursement related to a different transaction (972a-973a).

In late January and early February 1963, the loan packages were sent to the VA for its guaranties. Although Franklin actually made the submissions, the covering letter was on Wayne stationary which had previously been provided by Strang (346a, 1014a, 1913a).

The VA had no knowledge of Franklin's involvement at this time (411a-412a, 402a-403a). An examination of the loan package by the VA indicated that most were poor credit risks and that proper standards had not been followed (see 358a-359a, 376a-379a). Seven of the 22 applications were rejected by the VA (Pet. App. A 20). The VA then invited Strang to call at its office to discuss the loan program (394a-398a). Instead, Strang sent his secretary and

co-defendant Howard. Strang told Howard to conceal the fact that he was an employee of Franklin. At this meeting, Howard posed as a "Mr. Ross," a representative of Wayne (1030a-1032a, 1047a).

2. Prior to trial, petitioner moved to dismiss the indictment alleging, *inter alia*, that he was required to testify before the grand jury which ultimately returned the indictment in this case in violation of his Fifth and Sixth Amendment rights (59a). Following a two day evidentiary hearing on this issue,[5] the district court denied the motion with a lengthy memorandum opinion (105a-123a).

The evidence at the hearing showed that on July 31, 1964, almost three months before petitioner was called before the grand jury, he and James Draper, one of his lawyers, conferred with an FBI agent concerning the agent's interview with petitioner some two weeks before. The meeting of July 31 was arranged by petitioner so that his lawyer could review the statements Strang had made at the earlier interview.[6] The agent advised counsel and Strang that he was investigating mortgage transactions processed through Franklin, and that Strang might or might not ultimately be charged as a defendant. Mr. Draper indicated an awareness that petitioner could be

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[5] Prior to the hearings, opposing affidavits had been filed (See 66a-74a, 75a-76a, 79a-80a, 83a-85a, 86a, 87a-88a).

[6] Before conversing with the agent on this earlier date (July 13, 1964) petitioner was advised of his right to silence and counsel. The statement he made was an attempt to exonerate himself of any responsibility (See 1188a-1204a; see also 1233a-1246a).

charged as a member of a conspiracy (107a-112a, 116a-117a).

On October 20, 1964, a marshal attempted to serve a grand jury subpoena calling for petitioner's appearance on October 22. While actual service could not be accomplished (112a), the district court found that, as of October 20, petitioner was aware that his appearance was desired two days later. The court also found that all during this period petitioner had the services of at least five attorneys, and that he had the opportunity to contact and consult with counsel regarding his appearance before the grand jury (118a-120a). Petitioner appeared on October 22, and, before going into the grand jury room, conferred with the Assistant United States Attorney handling the investigation. He was advised that he did not have to testify to anything that might incriminate him. When he asked if he could take his attorney into the grand jury room, he was told that he could not. He was, however, permitted to make a telephone call before he entered the grand jury room. After being sworn before the grand jury and before questioning began, petitioner was again advised that he did not have to give any testimony that might incriminate him and that any testimony he gave would be "free and voluntary." He acknowledge the warning and thereupon testified (118a-119a, 120a).

Based on its resolution of the facts, the district court found no Fifth Amendment violation in the circumstances surrounding petitioner's appearance before the grand jury since he was aware of his status "as a potential defendant and of his right not to in-

criminate himself" (120a-121a). The court further found that "Strang had the assistance of counsel prior to entering the grand jury room and had the opportunity to avail himself of the assistance of counsel before entering the grand jury room as a witness" and voluntarily chose not to avail himself of that right (121a).

ARGUMENT

1. Petitioner argues that he was denied his right to have counsel present while the grand jury was interrogating him.[7] The refusal to grant petitioner's request that counsel be permitted to appear before the grand jury with him was, however, in accord with long-established policy presently embodied in Rule 6(d) F. R. Crim. P. The validity of this policy rests upon the proposition that for the grand jury to serve its unique investigatory function, it must operate with unfettered inquisitorial power. Its purpose is not to determine questions of guilt or innocence, nor are its operations comparable to the custodial inter-

[7] Petitioner also raises the issue (Pet. 11) that as a potential defendant he should not have been called as a witness before the grand jury at all. But petitioner was not a *de facto* defendant. On the contrary, at the time he was called, the grand jury was still seeking information in support of its investigation. In such circumstances, petitioner was properly subject to inquiry. See *e.g.*, *United States* v. *Scully*, 225 F. 2d 113, 114 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *Fortunato* v. *United States* (C.A. 2), No. 1273 Misc., this Term, certiorari denied, March 24, 1969; *Capaldo* v. *United States* (C.A. 2), No. 1352 Misc., this Term, certiorari denied, April 21, 1969.

rogation of an accused by government agents. Compare *Miranda* v. *Arizona*, 384 U.S. 436; see also, *United States* v. *Wade*, 388 U.S. 218. The function of the grand jury is to determine whether formal criminal charges should be lodged and against whom, a function which would be severely impaired by transforming it into an adversary proceeding. *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; see also, *In Re Groban*, 352 U.S. 330, 333.[8]

Nor, on this record, is there substance to the contention that "fundamental fairness" (Pet. 13) required government counsel specifically to advise petitioner that he had a right to confer with counsel outside the grand jury room. As the district court expressly found, beginning nearly three months before his grand jury appearance, petitioner had the services of at least five lawyers in connection with the pending investigation. Furthermore, petitioner knew two days before the return date of the subpoena that he was required to appear before the grand jury (120a). And, at his meeting with the government prosecutor on the day he was to appear, petitioner was permitted to use the office telephone. In this context, it is un-

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[8] The contrary district court decision in *Sheridan* v. *Garrison*, 273 F. Supp. 673 (E.D. La.) may fairly be limited to its peculiar facts. There, in the face of a substantial allegation that the witness was called before the grand jury for the purpose of harrassment, the district court was of the view that he should not, before the grand jury, "be forced outside the presence of counsel to match legal wits with the District Attorney" (273 F. Supp. at 684). There is not the slightest suggestion in this case that the grand jury function was misused to harass petitioner.

realistic to say that petitioner was deprived of his rights because he was not specifically informed that he had a right to confer with an attorney. As the court of appeals rightly held, petitioner was never denied these rights; he simply chose to forego them. (See Pet. App. A 12).

Nor, in these circumstances, were petitioner's rights violated because the government prosecutor failed to advise counsel for petitioner that petitioner had been subpoenaed to testify. Government counsel had every reason to expect that petitioner, an experienced business man, who had sought and obtained the assistance of counsel at an earlier stage in the case and who had ample opportunity to contact counsel before his appearance before the grand jury, would contact his lawyer or lawyers if he deemed such a procedure necessary.[9] In any event, compliance with Canon 9 of the Canons of Professional Ethics is not "a requirement of constitutional dimensions." *United States* v. *Smith*, 379 F. 2d 628, 633 (C.A. 7), certiorari denied, 389 U.S. 993. See *Massiah* v. *United States*, 377 U.S. 201, 210-211 (dissenting opinion).

2. Petitioner contends that the evidence showed two distinct conspiracies—the accommodation agreement in which he was involved, but which was lawful,

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[9] The situation here is thus far removed from the failure to notify counsel which troubled the dissenters in *Jones* v. *United States*, 342 F. 2d 863, 871, 878-884 (C.A.D.C.). There the defendant was an indigent who, after he had been arrested on a charge of assault and robbery, was taken before the grand jury and questioned about a previous confession without his appointed counsel being notified.

and the submission of false statements to the VA in which he was not involved at all—and that, in this factual setting, the trial court erred in refusing to instruct the jury on a multiple conspiracy theory. The evidence, however, showed a unitary scheme to thwart the VA in the operation of its home guaranty loan program. The government's case was not that the December 1962 agreement itself was illegal—a position which the government has never taken (see Pet. App. A 16)—but that it marked the commencement of a single scheme to defraud, participated in by all defendants. The evidence showed that Strang was involved in this scheme. He provided blank Wayne stationary which Franklin used for cover letters to accompany the fraudulent Rem loan packages to the VA; he himself signed several certifications on false VA documents (G. Exs. 6B, 6D, 1914a, 1915a, 1917a); he stated that he was simply going "through the motions" of approving the loans prepared at Franklin; he authorized partial disbursement before the loans were officially approved; and he affirmatively sought to conceal Franklin's involvement from the VA. He was, in short, an active partner in one overall scheme. As the district court concluded "[t]here is one conspiracy here or there isn't anything" (1649a). The court's instructions properly reflected this assessment of the evidence and the jury's verdict establishes that petitioner was found to be a knowing member of that conspiracy.

3. Petitioner (as the petitioners in Nos. 998 and 1089) urges that the trial court committed reversible error in refusing in his instructions to explain and

interpret the regulations of the VA concerning the home loan guaranty program. As the court of appeals noted, however, the pertinent regulations were read to the jury numerous times during the trial, and defense counsel referred to them extensively during closing arguments (G.A. 7-13).[10] An official of the VA was on the stand for nine days and was examined in great detail on the meaning of the regulations (433a-437a, 466a-467a, 476a, 480a, 485a, 493a, 496a, 503a-507a, G.A. 2-3). The "Lenders Manual" published by the VA was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to the regulations in his charge and carefully instructed the jury as to all the elements necessary to prove violation of 18 U.S.C. 371 and 1001 (1761a-1766a).[11] Since the essence of the government's case was not that the accommodation arrangements was per se illegal, but rather that it was used to facilitate a scheme to defraud the VA, a detailed instruction concerning the regulations was not required.

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[10] "G.A." designates the government's appendix to its brief in the court of appeals which is presently on file with the Clerk.

[11] *United States* v. *Guterma*, 281 F. 2d 742, 750-752 (C.A. 2) is inapposite. In that case, the court failed to define a technical regulatory term ("net book value"), the meaning of which was essential for determining whether the accused had the duty to file a report, where the failure to file such a report was the basis of a charge lodged against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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